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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re J.O., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.O.,

Defendant and Appellant.

A145223

(Contra Costa County
Super. Ct. No. J15-00317)

Defendant J.O. appeals from the juvenile court's dispositional order, contending one of his probation conditions is unconstitutionally vague in several respects. We will strike the challenged condition and remand with directions that the juvenile court enter a modified condition.

BACKGROUND

In March 2015, appellant was charged in a Welfare and Institutions Code section 602 petition with possession of matter depicting a minor engaging in sexual conduct (Pen. Code, § 311.11, subd. (a)) and misdemeanor sexual exploitation of a child (Pen. Code, § 311.3). Following a contested jurisdictional hearing, the juvenile court sustained both allegations. The evidence indicated two girls at appellant's high school sent him

sexually explicit photographs of themselves, which they asked him to delete but which he subsequently shared with others.

In May 2015, the juvenile court adjudged appellant a ward of the court, committed him to a specified county institution for six months with an additional 90-day conditional release period, and imposed conditions of probation. One of the conditions provided: “You’re to have no physical, verbal, written, electronic, third party, or any form of contact with the victims, [Jane Doe 1 and Jane Doe 2], and you’re ordered to stay 100 yards away from their homes and any member of their families.”

DISCUSSION

“Under Welfare and Institutions Code section 730, subdivision (b), a juvenile court may impose ‘any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’ In spite of the juvenile court’s broad discretion, ‘[a] probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.’ [Citation.] A defendant may contend for the first time on appeal that a probation condition is unconstitutionally vague or overbroad on its face when the challenge presents a pure question of law that the appellate court can resolve without reference to the sentencing record.” (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 357 (*Kevin F.*).

Appellant contends the condition requiring him to stay away from “any member of [the victims’] families” fails to define which members of the victims’ families are included. The People concede the phrase is ambiguous. Although the People suggest that we modify the condition to refer only to the victims’ parents and siblings, they cite no basis in the record for us to determine which family members the juvenile court intended to be covered. Accordingly, we will direct the juvenile court to modify the

condition by specifically identifying which of the victims' family members are included in the prohibition.

Appellant next argues the condition must be modified to provide that he is prohibited from *knowingly* contacting the victims; he must stay away from places *he knows* to be their homes; and he must not *knowingly* come within 100 yards of the specified family members. (See *Kevin F.*, *supra*, 239 Cal.App.4th at p. 365 [even where “a probationer can easily understand the type of conduct that is proscribed (i.e., he may not possess weapons) . . . [t]o provide adequate protection against unwitting violations, the probationer must engage in the proscribed conduct *knowingly* (i.e., with actual intent and understanding that he possesses something constituting a weapon). Particularly since there is a conditional liberty interest at stake, we think the addition of an express knowledge requirement making the scope of the prohibited conduct clear in advance to all who may be involved—to probationers, to law enforcement officers, to probation departments, and to juvenile courts—best comports with due process.”].)

The People argue the requested modifications are unnecessary because appellant can only violate a condition of his probation if he does so willfully.¹ The primary case relied on by the People is *People v. Gaines*, which concluded, “if the probation condition clearly puts probationers on notice of the type of conduct to be avoided, it should be unnecessary to inform the probationers they will violate probation if they engage in that conduct willfully.” (*People v. Gaines* (2015) 242 Cal.App.4th 1035, 1039, review granted Feb. 17, 2016, S231723 (*Gaines*).) Our Supreme Court has subsequently granted a petition for review in *Gaines* and the Court of Appeal opinion has been depublished. (Cal. Rules of Court, rule 8.1105(e)(1).) In any event, *Gaines* did not conclude the addition of a mens rea element was wrong, but simply that it was unnecessary. (*Gaines*,

¹ The People also claim appellant fails to explain how he could unwittingly contact the victims. However, appellant provided several examples: “calling either’s place of employment and speaking with her on the telephone without knowing she works there,” “entering an online chat room and unwittingly communicating with one of them because her screen name is not familiar to him,” or “posting something on Facebook, which that service automatically forwards to one of them because they have common ‘friends.’ ”

supra, at p. 1039 [“sentencing courts need not include a requirement that a probationer knowingly violated a condition in order to protect against enforcement of unwitting violations”].) The court’s primary concern with including the mens rea element in *Gaines* seemed to be the proliferation of appeals involving the issue. (*See id.* at pp. 1038–1039 [noting another court’s frustration “with the ‘dismaying regularity’ of having to ‘revisit the issue in orders of probation’ ”].)

Two cases involving this question are currently pending before our Supreme Court. (*In re A.S.*, review granted Sept. 24, 2014, S220280; *People v. Hall*, review granted Sept. 9, 2015, S227193.) While awaiting guidance from our Supreme Court on this issue, we will continue to err on the side of caution and include the explicit—if perhaps unnecessary—requirement that probation violations be knowing.

DISPOSITION

The challenged probation condition is stricken. On remand, the juvenile court is directed to modify the condition to include knowledge requirements and to specify which family members of the victims are covered by the condition. The juvenile court’s orders are otherwise affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.